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NO. 89-1377

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

ANN TROITINO JOHNSTON,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition For Writ of Certiorari
To the Fourteenth Court of Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a Texas Court may require a criminal defendant to prove prejudice from constitutionally deficient assistance of counsel by a preponderance of the evidence, when this Court, in *Strickland v. Washington*, 466 U.S. 668 (1984), has specifically stated that relief shall be afforded on a lesser "reasonable probability" standard.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Appeals for the Fourteenth Supreme Judicial District affirming

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[1]For clarity, Respondent is referred to herein as "the State" and Petitioner as "Johnston."

Johnston's conviction and sentence is attached to the Petition for Writ of Certiorari. The Court of Appeals denied rehearing on July 13, 1989. The Texas Court of Criminal Appeals denied Johnston's petition for discretionary review on October 25, 1989, and her motion for rehearing on November 29, 1989.

JURISDICTION

Johnston seeks to invoke the Court's jurisdiction under the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Johnston bases her claim on the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of proceedings and Disposition Below

On May 21, 1986, Johnston was indicted for the involuntary manslaughter of Susan Scrace, the indictment alleging that Johnston, while intoxicated, operated her motor vehicle and by accident and mistake caused it to collide with a vehicle occupied by Scrace causing her death. **See** Tex. Penal Code Ann. § 19.05(a)(2) (Vernon Supp. 1989). Upon her plea of not guilty, Johnston was tried before a jury, which on April 7, 1988, found her guilty of the charged offense. On July 7, 1988, the trial court assessed punishment at ten years in the Texas Department of Criminal Justice, Institutional Division. This conviction and sentence was affirmed by the Court of Appeals for the Fourteenth Supreme Judicial District of Texas on June 15, 1989. *Johnston v. State*, No. C14-00873-CR, slip op.

(Tex.App.--Houston [14th Dist.] 1989). Johnston's petition for rehearing was denied by that court on July 13, 1989. The Texas Court of Criminal Appeals refused Johnston's petition for discretionary review on October 25, 1989, and her motion for rehearing on November 29, 1989. Johnston filed her petition for writ of certiorari to this Court on February 27, 1990.

B. Statement of Facts

In the early morning hours of May 11, 1986, Johnston drove her Chrysler LeBaron convertible through a red light without braking and collided with Cynthia Fisher's Toyota Corolla. Susan Scrace, a passenger in the Toyota, died approximately four hours later of a ruptured liver and abdomen. Witnesses at the scene considered Johnston to be intoxicated. She smelled strongly of alcohol and asked for coffee so that she could sober up before police came to the scene (SF III 157-58).[2] Her eyes were red and glassy and her speech was slurred (SF III 163-166). She fell onto one witness (SF III 158), and did not know where she was (SF III 166). She was unable to get her keys out of the ignition because the engine was still in gear (SF III 78). Johnston did not avail herself of medical assistance at the scene, but instead wanted to make phone calls. Witness Melissa Adams assisted Johnston in making the calls because Johnston was unable to dial the phone or remember phone numbers. She asked Adams to slap her so that she could sober up before police arrived (SF III 168).

Johnston left the scene of the accident with her sister after the victims were taken to the hospital.

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[2]"SF" refers to the statement of facts of Johnston's trial, consisting of pleadings filed in the trial court and a transcript of the trial, by volume and page number.

Johnston did not seek medical treatment at any hospital that night or for the next few days (SF IV 358). Johnston did not contact police. Officers investigating the accident located Johnston by examining a credit card bill in her car and by investigating the car registration (SF III 132).

Johnston's trial defense was that the symptoms of intoxication shown at the scene of the accident were actually caused by a mild head injury suffered during the collision. She presented the testimony of a neuro-psychologist who examined her almost one year after the offense. He testified that her actions at the scene were consistent with those of a person who had suffered a head injury (SF III 211-258). Her sister, who arrived at the scene about forty-five minutes after the collision, testified that Johnston did not appear intoxicated (SF IV 345-378). An expert in accident reconstruction testified that, according to his calculations, it was the driver of the Toyota, rather than Johnston, who was exceeding the speed limit at the time of the collision (SF IV 263-297). Finally, an expert in alcohol burn-off rates testified that the victim, who was a passenger and not driving, was intoxicated (SF IV 301-336).

The jury found Johnston guilty as charged in the indictment. The trial judge, after reviewing the presentence report, assessed punishment at ten years in the Texas Department of Criminal Justice, stating that he would consider a motion for shock probation as provided by statute in one hundred twenty days.

Johnston appealed her conviction, alleging that her counsel was ineffective under both the United States and Texas Constitutions in five respects: 1) in calling Les Radford, a private investigator, who provided impeachment testimony of the eyewitnesses

but who also testified to their prior consistent statements; 2) in failing to object when the prosecutor asked an expert defense witness who was paying him; 3) in calling to the stand Johnston's sister, who testified that Johnston did not appear intoxicated but who also admitted that Johnston had been drinking earlier; 4) in failing at the sentencing phase of trial to emphasize the effect of a felony conviction on an attorney's career; and 5) in failing to properly prepare an expert witness for the defense. The Court of Appeals for the Fourteenth Supreme Judicial District rejected these arguments and affirmed the conviction.[3]

SUMMARY OF ARGUMENT

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Johnston's claim involves the court below's correct application of settled legal and constitutional principles set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to her particular fact situation. Johnston has advanced no special or important reason in this case and none exists.

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[3]In the court below, Johnston set out three points of error: (1) ineffective assistance of counsel in violation of the U.S. Constitution; (2) ineffective assistance of counsel in violation of the Texas Constitution; and (3) trial error in an evidentiary ruling. She did not, however, brief the first two points separately. In its opinion, the court below addressed as a federal claim only Johnston's assertion that counsel erred in calling Investigator Radford, apparently because that claim was presented first. The remaining allegations of deficient performance, as well as the challenge to counsel's decision to call Radford, were considered under Johnston's state constitutional claim.

The court below, in determining Johnston's federal claim, correctly determined that the alleged deficiency of counsel in calling to the stand a private investigator did not constitute an error that undermined confidence in the outcome of the trial. There was no basis for speculation that, absent counsel's strategic decisions challenged by Johnston, the jury's verdict would have been different. The lower court's opinion nowhere mentions the alleged erroneous standard of review of ineffectiveness claims which Johnston asserts was employed by that court.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Johnston has advanced no special or important reason in this case, and none exists. This case presents only the question whether well-settled constitutional principles were applied correctly to the facts of this case. Thus, no important question of law is presented.

II.

THE COURT OF APPEALS PROPERLY APPLIED THE TEST FOR JUDGING EFFECTIVE ASSISTANCE OF COUNSEL SET OUT IN STRICKLAND V. WASHINGTON AND CORRECTLY DETERMINED THAT JOHNSTON HAD FAILED TO SHOW PREJUDICE TO HER DEFENSE.

A. The Strickland Standard

To merit relief on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant must show both: (1) that counsel's performance was deficient in that it fell below an objective standard of reasonable service; and (2) that the deficient performance prejudiced the defense such that there is a reasonable probability that the outcome of the trial has been undermined and the result of the trial would have been different. Unless both showings are made, a defendant is not entitled to relief. *Id.* at 687-97. Moreover, a court need not examine whether counsel's performance was deficient if it determines that a defendant suffered no prejudice. *Strickland* at 697.

In reviewing such claims, "judicial scrutiny of counsel's performance must be highly deferential," *Id.* at 689, and every effort must be made to eliminate the "distorting effect of hindsight." *Id.* Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and a defendant must overcome the presumption that the "challenged action 'might be considered sound trial strategy.'" *Id.* To demonstrate

prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

B. The Decision of the Court Below

Johnston claims that the court below found that counsel's presentation of Radford's testimony constituted deficient performance under *Strickland*. Johnston then complains that the lower court improperly required her to demonstrate prejudice under *Strickland* by a preponderance of the evidence. There is no support in the record for these assertions. The court made no determination whether counsel erred in deciding to call the private investigator. It held only that the *Strickland* test was not met because there was "*no basis* for speculating that the jury would have returned a verdict of not guilty had defense counsel chosen not to try to impeach the [State's] witnesses' testimony." *Johnston v. State*, No. C-14-00873-CR, Slip op. at 4 (emphasis added). The court below, thus, concluded that Johnston was unable to show *any* prejudice from the alleged errors of counsel, much less the amount required by *Strickland*. Moreover, there is no indication in the opinion that Johnston was held to a preponderance standard. The conclusion of the lower court was that Johnston could not show that even those decisions by counsel, which in hindsight appeared not to further her defense, provided *any* basis for a different jury verdict. *Johnston v. State,* slip op. at 4.

The determination of the court below that Johnston was not prejudiced by the alleged deficiencies in counsel's performance is fully supported in the record. Johnston characterizes the state's case as "thin" and her potential defense as strong in an attempt to establish a reasonable probability that, absent

counsel's decision to introduce the testimony of Radford, the outcome of the trial would have been different. Her argument is not supported by the evidence. The testimony of eyewitnesses Adams and Brandes was unequivocal and compelling. The two women observed Johnston drive through the red light without braking, and then observed her demeanor after the collision. Johnston admitted her intoxication to them and even requested their help in hiding it. Although Johnston argues that the lack of any laboratory tests assessing her blood alcohol content demonstrates that the state's case was weak, she offers no authority for the suggestion that such evidence was inherently more reliable than that offered by the State. Moreover, as noted by the prosecutor, although Johnston claimed to have suffered significant injuries in the collision, she carefully avoided receiving medical treatment that could have exposed her to laboratory tests which would have corroborated the state's contention that she was intoxicated at the time of the collision (SF V 400).

Johnston further claims that the state's case was weak because she presented evidence, through a neuropsychologist, that her behavior was due to a head injury sustained during the collision. However, this witness, who was not a physician, did not examine Johnston until nearly a year after the injury occurred. His testimony cast no significant doubt on the evidence of intoxication described by two disinterested witnesses, Adams and Brandes, such as the alcohol on her breath and her inculpatory statements.

Johnston alleges that the jury could have entertained reasonable doubt by virtue of the testimony of another witness who observed her minutes after the accident and testified that she did not appear intoxicated. The record reflects that the witness to whom Johnston refers was her sister, that her observation of

Johnston occurred forty-five minutes after the accident occurred (after Johnston had, at her own request, been slapped and given coffee in order to sober up), and that her testimony at trial was so unconvincing that the decision to call her as a witness constituted one of Johnston's claims of ineffective assistance of counsel in the court below. In light of these facts, Johnston's present attempt to offer her sister's testimony to this Court as support for her argument that, absent the alleged error in counsel's performance, the jury would have entertained a reasonable doubt as to her guilt is simply not credible.[4]

Johnston cites several Court of Criminal Appeals' and state intermediate Courts of Appeals' opinions which, she claims, erroneously require a defendant to demonstrate prejudice from counsel's errors by a preponderance of the evidence. Contrary to Johnston's assertion, however, none of the cited cases require a defendant to bear such a burden in demonstrating prejudice under *Strickland*. The language in the cases of which Johnston complains pertains to the heavy burden imposed on a defendant who is attempting to show that specific acts of counsel were outside the wide range of professionally competent assistance,

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[4]Johnston also complains that, in its assessment of prejudice, the court below erroneously assumed the fact of her intoxication. This claim is nothing more than an attempt to challenge the sufficiency of the evidence. Johnston did not challenge the sufficiency of the evidence in the court below and may not raise such a claim for the first time on certiorari review. Moreover, *Strickland* teaches that, in making the determination whether a specified error resulted in the required prejudice, a court should presume, absent a challenge to the judgement on grounds of evidentiary insufficiency, that the judge or jury acted according to the law. 466 U.S. 694. Because Johnston has never challenged the sufficiency of the evidence to sustain her conviction, the court below correctly assumed the facts supported by the verdict.

a standard formulated by the Fifth Circuit in *McKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), adopted by Texas courts in *Carraway v. State*, 417 S.W.2d 159, 163 (Tex. Crim. App. 1967), and sanctioned by this Court in *Strickland v. Washington, supra*:

> To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. *Cf. Trapnell v. United States*, 725 F.2d at 153 (in several years of applying "farce and mockery" standard along with "reasonable competence" standard, court "never found that the result of a case hinged on the choice of a particular standard"). In particular, the minor differences in the lower courts' precise formulations of the *performance standard* are insignificant: the different formulations are mere variations of the overarching reasonableness standard.

Strickland at 696-697. (Emphasis added). Because the cases named by Johnston do not stand for an erroneous application of the prejudice standard set out in *Strickland*, her claim is without merit.

Moreover, even had the court below imposed a burden of persuasion on Johnston to establish by a preponderance of the evidence facts necessary to establish prejudice under *Strickland*, such would be proper. *Strickland* arose in the context of a habeas corpus petition brought under 28 U.S.C. § 2254. Thus, Strickland was required to establish facts necessary to

establish ineffective assistance of counsel in his habeas petition by a preponderance of the evidence. Nonetheless, this Court held that the rule announced in *Strickland* was the same whether the case arose on direct appeal or in collateral proceedings. 466 U.S. at 697-98. Thus, a requirement that Johnston demonstrate by a preponderance of the evidence facts sufficient to establish prejudice under *Strickland* would be proper. Johnston's claim to the contrary is meritless.

The record reflects that the court below applied the correct constitutional standard, and Johnston's claim involves only the application of this well-settled constitutional standard, enunciated in *Strickland v. Washington*, *supra*, to her particular fact situation. This Court sits to decide important, novel or recurring questions implicating constitutional guarantees, not to review evidentiary determinations founded on settled principles of constitutional law. Johnston's claim does not justify this Court's exercise of its certiorari jurisdiction. *Tacon v. Arizona*, 410 U.S. 351, 352 (1983); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

CONCLUSION

For the foregoing reasons, the state respectfully requests that the writ of certiorari be denied.

Respectfully submitted,

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